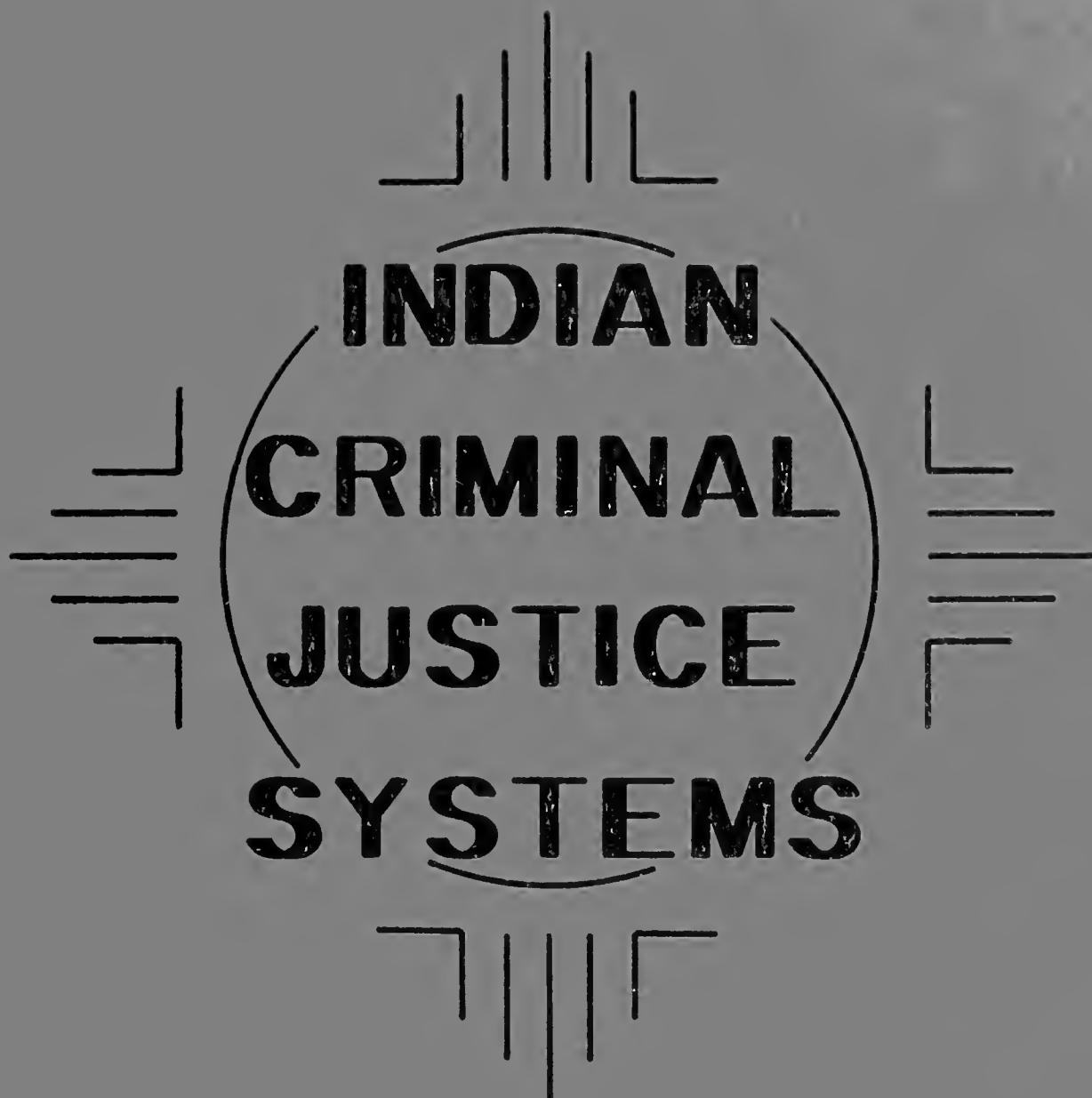


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## I. INTRODUCTION - INDIAN RESERVATIONS

Montana has, within its exterior boundaries, seven Indian Reservations comprising 13,042.8 square miles or 8.8% of its total area and 36,443 Indians or 5.2% of the total state population. Tribal enrollees migrate to and from each of these reservations and many maintain their tribal status while not actually living on the reservations at any time. Montana's Indian population ranks sixth in the nation.

All of the tribes have been experiencing rather spectacular increases in population for the last several years. As a result of an annual growth rate of about 2.5 per cent, a significant fact has surfaced about the Indian population. Nearly 60 per cent of Montana's Indians are 19 years of age or under with the median age estimated to be 22.5 years.

Each of these Indian Reservations has its governing body and as such is a legally constituted local unit of government. Though similar in nature, each has elements that differ from the other six in so far as membership rules for enrollee status, procedures for doing business and overall mechanics of handling their individual judicial prevention and enforcement services. For purposes of criminal justice planning and grant assistance, of course, each is classified as a local unit of government.

Among the many services supplied by the tribal governments are those which include their judicial, prevention and enforcement services. Many of these services are supplemented by the Bureau of Indian Affairs by what is known as Bi-Indian Act contracts, due to the overall financial conditions that exist within the respective reservations.

Other social and economic difficulties inherent in the American Indian culture, which have been well documented and frequently stated, are inseparably interwoven with their specific criminal justice system problems, and as a direct result present a unique set of varying circumstances not found anywhere else in the annals of criminal justice records.

Generally speaking, Montana has no jurisdiction over Indians on Indian lands.<sup>1</sup> The federal government has plenary authority and jurisdiction over Indian offenses when committed on Indian land; it has concurrent jurisdiction with the tribal court to try all Indian offenders for crimes prescribed by state law if the crime is committed on Indian land. The State of Montana has jurisdiction in all criminal cases involving Indians committing offenses outside the geographic perimeter of the Indian Reservation.

The State of Montana has the responsibility to care for all Indians who are committed to its institutions. Statistical information from these institutions indicates that the Indian inmate population averages about 29%. The necessity to plan for prevention and rehabilitation programs in this area cannot be over emphasized. The Indians in Montana have perhaps the most critical situation that exists in the state today concerning correctional facilities -- both adult and juvenile.

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1. Refer to Flathead Reservation

The lack of adequate correctional facilities on reservations has become a priority problem due to a recent Montana Supreme Court decision<sup>2</sup> which restricts the jurisdiction of state district courts over offenders convicted by tribal courts. State courts can no longer commit these offenders to state institutions.

A great deal of planning is needed in the area of jurisdiction before a critical situation becomes intolerable.

The following information represents a condensed view of each Indian Reservation as it relates to the Indian criminal justice system.

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2. Blackwolf v. District Court, 493 P.2d 1293 (1972)

## II. THE FLATHEAD INDIAN RESERVATION

The Flathead Reservation is located on the western slope of the Continental Divide in northwestern Montana. It is in one of the most scenic locations of the Rocky Mountain west, having spectacular mountains on the east, west, and south and beautiful Flathead Lake on the north.

The Flathead Indian Reservation is the home ground of the Confederated Salish and Kootenai Tribes. These tribes are from different linguistic backgrounds, but both are related to other tribes of the Pacific Northwest. A small group of Flathead tribal members are direct descendants of an early-day band of Pend Oreille Indians.

The present 614,846 acres that make up the area of the Flathead Reservation was reduced from the 1,242,969 acres known as the Jocko Reserve and the Bitterroot Valley to the south. In 1872 those Indians living in the Bitterroot Valley were moved north to the present location and the Bitterroot lands were opened to white homesteaders. As compensation for this action, the tribes were to receive \$5000.00 annually for 10 years plus the proceeds of the sale of their lands to the homesteaders. In 1966 the Indian Claims Commission awarded the tribes nearly \$4 1/2 million in final settlement of major treaty-based claims. Other smaller claims are pending.

Of the 614,846 acres contained within the exterior boundaries of the present reservation, 561,027 acres are owned by the tribes. The balance, excepting 1,017 acres in government reserve, are in individual Indian ownership.

One of two major sources of income for the financial support of the Flathead Reservation comes from valuable commercial timber stands. More than 100 tribal members are employed in two large sawmills which are owned by non-Indians but located on the reservation. There are other mills in the vicinity which employ Indians and many work in associated logging operations. This industry alone produces in excess of 1 1/2 million dollars income to the Flathead Indian Tribal government.

In addition to the timber income, the tribe has been receiving an annual rental of \$238,375 for the site of Kerr Dam. This hydro-electric facility is owned by the Montana Power Company. A recent Supreme Court decision<sup>3</sup> re-adjusted this rental figure to \$950,000 per year (as ordered by the Federal Power Commission), and made the adjustment retro-active to May of 1959. These and other sources of income, including Christmas tree sales and grazing leases, make the Flathead Tribes the most prosperous of any Indian group in Montana.

About 12% of a 118,000 acre irrigation system, operated by the Bureau of Indian Affairs, is owned by the Indians. The Flathead Irrigation Project also operates an electric power system.

Of the 14,000 persons estimated to be living on the Flathead Reservation, only 3,122 are Indians. There has been much inter-marriage with Caucasians, and many tribal members are indistinguishable from non-Indians in appearance, speech and manner of living.

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3. Confederated Salish & Kootenai v. Montana Power  
459 F.2d. 863, (1972)

The rate of unemployment and under-employment is less on the Flathead than it is on most other reservations. Tribal children attend mission and public schools.

The tribes constitution and by-laws were approved by the Secretary of the Interior October 28, 1935, after the Flathead Indians chose to organize under the Wheeler-Howard Act (also known as the Indian Reorganization Act). The corporate charter was ratified April 25, 1936. The governing body of the Confederated Salish and Kootenai tribes is a tribal council of ten members, elected on a district basis. Council members are elected for four-year terms by secret ballot. Elections are held every two years, with five councilmen chosen at each election. The chairman and other officers are elected by the council from within its membership.

In 1963, the Tribal Council made the decision to allow the State of Montana the privilege of concurrent civil and criminal jurisdiction with the tribal court. This means that the State of Montana assumes jurisdiction whenever there is an offense committed that would normally come under federal jurisdiction according to the Major Crimes Act of March 3, 1885 as amended. (Formerly 7 in number, now 13 crimes).

Criminal jurisdiction in the field of Indian law involves a division of authority, among federal, Indian, and state courts, which may be based on subject matter, place, or person. From the standpoint of areas of application, the federal criminal statutes relating to Indian affairs generally are of two types: (a) Those that apply regardless of the place of the offense; (b) offenses punishable by the United States only, when committed within "Indian Country".

Most of the federal statutes are of the latter type and are generally subject to further classification on the basis of subject matter or identity of person. Because lower federal courts are of limited jurisdiction, a basis for exercise of jurisdiction must be found in every instance. Aside from the offenses covered by the Major Crimes Act, all offenses committed by Indians against Indians or Indian property in "Indian Country" are within the jurisdiction of the tribal courts.

There are no Special Officers as such on the Flathead Reservation. Two officers employed by the Bureau of Indian Affairs provide prevention and rehabilitation services. The tribal police department consists of a Chief of Police and five patrolmen, two of which are hired by funds provided by the Emergency Employment Act. The judicial branch of this reservation is staffed with one full-time tribal judge and three part-time associate judges. The total compliment of judicial, prevention and Enforcement personnel on the Flathead Indian Reservation is twelve.

These people, along with the tribal council, Law & Order Commission and a volunteer planner, are starting to assess the needs and problems of their reservation in order to set priorities for their upcoming plan to improve the capabilities of their criminal justice system over the next 5 years.

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4. Criminal Investigator - Bureau of Indian Affairs

The FY '71 budget for the Confederated Salish & Kootenai tribal law and order program was \$57,785 supplemented by \$4,000 from contracts with the Bureau of Indian Affairs. In addition, the judicial, prevention and enforcement services of the B.I.A. supplied \$41,628 in services by providing juvenile officers and supervisors. The cooperation between the Tribal Police and adjacent local and county police is generally good.

The priorities, set by the Tribal Law and Order Committee, to improve their criminal justice system parallel those set by the State Planning Agency to improve the capabilities of the criminal justice system within the State of Montana.

At this writing, the Flathead Indian Reservation is the only reservation within the State of Montana whose criminal justice system has access to the institutions controlled by the state. They are badly in need of both adult and juvenile correctional facilities.

In order to increase the capabilities of the tribal police, the planners on the Flathead Reservation have received a discretionary grant for manpower & equipment in the amount of \$41,831. To complement this grant, the tribes will request funds from the S.P.A. for training at M.L.E.A. through their affiliation with the Region I Advisory Council.

In the future, as a part of their multi-year plan, the Confederated Salish & Kootenai Tribes will study the possibility of constructing and operating correctional facilities. With the situation that exists on the

Flathead Reservation -- concurrent jurisdiction with the State of Montana-- it might be practical for the Indians to build and operate a correctional facility and offer services to local law enforcement agencies on a contractual basis.

### III. THE BLACKFEET INDIAN RESERVATION

The Blackfeet Indian Reservation, comprising 1,525,712 acres, extends eastward from Glacier National Park, south of the Canada-United States international boundary line, through the foothills of the Rocky Mountains toward the Great Plains. The reservation is about 45 miles east to west and the southern tip of the reservation is approximately sixty miles from Canada. The headquarters of the Blackfeet Indian Agency has been in the incorporated town of Browning, Montana, since 1894.

The reservation was established in 1851 and the southern boundary was moved 200 miles north by Presidential order and Congressional Acts in 1873 and 1874.

The Blackfeet Tribe faced starvation in the latter part of the 19th century after the white men annihilated the buffalo herds. They had become dependent upon items acquired by trade with the whites, but had nothing left with which to barter. At this point, the Blackfeet were forced to accept reservation living and food rationing for survival. In 1888, additional lands were ceded to the United States Government by treaty and separate boundaries established for the Blackfeet, Fort Belknap and Fort Peck reservations.

The Blackfeet Tribe was organized under the Indian Reorganization Act (Wheeler-Howard) in 1935. The governing body is the Blackfeet Business Council of nine members.

Of the 10,198 enrolled members of the Blackfeet tribe, about 6,214 live on the reservation. Approximately 27% of the enrolled members are three-fourths or more Indian blood. The Blackfeet tribe in the past has been less restrictive in qualifications for membership than most tribes. As a result, more than 26% of the enrollees are less than one-quarter Indian blood. Since 1962 the tribe has restricted membership to persons of one-quarter or more of Blackfeet blood.

Since 1956, when the Cut Bank Boarding School terminated its academic program, all Indian children on the Blackfeet reservation have attended public schools. The Blackfeet Boarding Dormitory still provides a home for those children from isolated districts and socially inadequate homes during the school year.

The Blackfeet have made much progress in agriculture during recent years. Today nearly half of the families receive some agricultural income. Most of the Indian-operated farms and ranches are too small to provide complete family support. Seasonal occupations provide additional income. Much of the available farm and ranch land is leased to the white ranchers. The traditional concept of wealth, measured by possession of horses, has persisted to some degree and retarded full utilization of the range for expansion of livestock programs.

Through the years there have been several tribal enterprises organized to increase opportunities for the Indians to become self-supporting. The Blackfeet Crafts Organization derives considerable

income from the sale of craft products through the Northern Plains Craft Shop in the Plains Indian Museum at Browning, and through its own store, operated during the tourist season at St. Mary's in Glacier National Park. Two Medicine Dam, destroyed in the 1964 flood, has been rebuilt and will provide water for the Blackfeet irrigation system. A forest products enterprise is currently marketing tribal timber. This tribal resource is sold to a privately owned lumber mill located on tribal land. At least 35 members of the Blackfeet tribe are employees of this mill and other members work in the logging operations.

The tribal police department on the Blackfeet reservation is operating from a facility which was built in 1970. They have a 24-hour operation and operate 3 regular shifts with one overlapping shift. The police department consists of a full-time Chief of Police and eleven sworn policemen; one is designated as a juvenile officer; two are criminal investigators. In addition to the tribal police, the BIA provides one special officer whose diversified services include criminal investigation and in-service training for the tribal police.

Training has been sporadic and with minimal direction up to this time. Four of the tribal police officers are graduates of the Roswell Indian Police Academy and all of the officers were exposed to a Law Enforcement Training Program funded by the Law Enforcement Assistance Administration (LEAA). The in-service training is infrequently

conducted, and there is no incentive offered to induce a desire for more education in the field of law enforcement. A good share of the planning difficulties for the Indian criminal justice system stems from attempting to compare the Indian system to the non-Indian system. One approach to this difficult problem would be the development of separate minimum standards for Indian police, courts and corrections on each reservation.

The Blackfeet tribe has five marked, radio equipped, police vehicles on lease from G.S.A., and two unmarked vehicles which are utilized primarily by the criminal investigators. The police officers have been equipped with the normal personal police gear, including uniforms, by equipment grants from L.E.A.A. At present, a discretionary grant application in the amount of \$11,099.25 for equipment to supplement their basic minimums is pending in the L.E.A.A. regional office in Denver.

The judicial branch of the Blackfeet criminal justice system is entering an innovating and demonstrative program of court before funded by L.E.A.A. with a discretionary grant of \$48,830.

This program is designed to develop a tribal judicial department which will insure that criminal justice is administered in a manner consistent with the Civil Rights Act of 1968 for all Indians living on the Blackfeet reservation. The project will provide trained personnel to effectively manage and supervise the tribal court, and provide competent prosecutor and defender services. To date, no Indian reservation has been able to put into operation fully developed and staffed judicial departments.

This project represents the first fully comprehensive approach to the problem of developing an effective tribal court system. Hopefully the evaluation will indicate the practicality of trying to interest the other six Indian reservations in a revision of their judicial systems.

The Blackfeet are faced with the same dilemma facing other Indian governments (except for the Flathead tribes), i.e., no access to Montana correctional institutions.

In the FY-71, a total of 72 felony (adult and juvenile) arrests were made, of which 54% were offenses against the person. Sixty-eight of these arrests were disposed of by the tribal court - hence a misdemeanor disposition; one was disposed of as a felony and the remainder were adjudicated as juvenile delinquents. During the same period there were 2,204 misdemeanor arrests made, 3.7% being juveniles. Over 89% of the arrests made were related to incidents precipitated by the use and abuse of alcohol.

The availability of criminal justice system supplemental funding through federal agencies such as Law Enforcement Assistance Administration (L.E.A.A.) is becoming more widely known and accepted by all of the Indian reservations. President Nixon's policy of Indian self-determination is being followed as closely as is possible. Each Indian tribe has been asked to compile a comprehensive plan for the improvement of its criminal justice system over a period of two to five years. As a result of this planning, the Omnibus Crime Control and Safe Streets Act has

provided in excess of \$74,000 for the Blackfeet reservation. Two additional programs in excess of \$80,000 are being considered at this time, one of which is designed as a supplement to an existing juvenile correctional facility to enhance the modification of juvenile behavior patterns on the Blackfeet Indian Reservation.

#### IV. THE ROCKY BOY INDIAN RESERVATION

The Rocky Boy Indian Reservation, in the Bear Paw Mountains of north central Montana, differs in several aspects from other reservations in Montana. It is the smallest in area and has the least population of any reservation in the State. It is also the newest reservation, having been established by executive order in 1916.

This Indian reservation takes it's unusual name from the leader of a wandering band of Chippewa Indians. Translated from the Chippewa, his name meant "Stone Child". Some white man changed this to "Rocky Boy".

Rocky Boy's people were among a number of Chippewa and Cree Indians who originated in the Great Lakes region. For some reason they had severed their ties with their original tribes and migrated to the northern plains region, wandering from place to place in what is now Montana and southern Canada. As rootless bands, Montana tended to regard them as "Canadian Indians" and in 1896 Congress appropriated \$5,000 to finance their deportation from Montana to Canada. Some were deported, but they quickly returned, where upon a number of prominent Montanans and Indian leaders, weary of the hand-to-mouth existence of their people, finally brought about the creation of the Rocky Boy Indian Reservation in 1916. 55,000 acres, a part of the old Fort Assiniboine Military Reserve south of Havre was designated as refuge for the "homeless and wandering" Indians. About half of those eligible chose to settle on the new reservation.

In later years, more land was added to the reservation until it reached its present size of 107,613 acres.

In 1935, the reservation people elected to organize under provisions of the Wheeler-Howard (Indian Reorganization) Act. They formed the Chippewa-Cree Tribe of the Rocky Boy Indian Reservation. Their constitution was approved in 1935 and their charter was ratified the following year.

The governing body is a business committee composed of nine members elected for two-year terms. This group in turn chooses the tribal officers.

The tribal population has grown through the years and today there are about 2,016 enrolled members. Approximately 60% of this number reside on the reservation. These residents face a critical economic situation. The entire reservation is no larger than some one-family cattle ranches in Montana. Natural resources are limited to grazing land, a small stand of marginal timber and about 500 acres of hay land,

Recent trends of development have contributed somewhat to the economic and social well being of the Chippewa-Cree Tribe. Resources have been expanded to include oil and gas exploration, mineral exploration and a recreation development (ski course).

All land on the Rocky Boy reservation is owned by the tribe and individuals may obtain a free use assignment of up to 160 acres.

The future for unskilled workers here, as elsewhere, is bleak due to increased mechanization.

Lands not in free use by tribal members are leased to others. This is a principal source of income for the tribe, but seldom exceeds \$35,000 per year.

The schools on the Rocky Boy Reservation are unique in that they are bilingual in nature. Only one other reservation in the United States has a bilingual school system. At the present time, the existing elementary school is being expanded to provide bilingual studies to the higher grades. Along with teaching the verbal aspects of the Cree language, they have established and teach their own written language.

The Indian criminal justice system on the Rocky Boy Reservation consists of one full-time Chief of Police, four sworn patrolmen, one B.I.A. special officer, one part-time chief judge (2 days a week), and six trainees from the "New Careers"<sup>5</sup> program. The entire criminal justice system is operated as a joint contract with the Indians and the Bureau of Indian Affairs.

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5. "New Careers" Community Service Officers Project of (Montana Inter-Tribal Policy Board) Indian Reservations

Amount of Grant	\$144,499.00
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The overall objective of this project is to improve the capability of the Indian criminal justice system on each Indian reservation, by enabling the employment and training of 50 community service officers and to allow the criminal justice system to be more responsive to the identified needs of those specific individuals in need of counseling and rehabilitative services, with particular emphasis on Indian youth and delinquency prevention.

In addition to funds under contract with the B.I.A., the Law Enforcement Assistance Administration, through discretionary funding, has supplied \$34,439 to up-grading the criminal justice system by employment of two additional officers plus the necessary equipment for them to carry out their responsibilities.

At the present time, planning is taking place at the tribal level that may justify an application for discretionary funds to construct a juvenile correctional facility. Even though there are people assigned to duties as juvenile counselors, their efforts are at most minimal due to the fact that there is no facility or rehabilitation program to augment a facility. The situation is not as serious on the Rocky Boy reservation, perhaps, as it is on some of the other Montana reservations, but there is general agreement among officials of the B.I.A. and the tribes that this is an area which has been badly neglected. Along with the development of adult and juvenile programs and facilities on the respective Indian reservations, it appears that it would be most advantageous to the Indian people if a project were to be developed in conjunction with a program which could provide reliable access to a system which provides for commitment to institutional placement where needed. There are feasibility studies being made at this time which may clarify the situation and give some direction to those persons who are developing the planning cycle.

## V. THE FORT BELKNAP INDIAN RESERVATION

The Fort Belknap Indian Reservation, south of the Milk River in north central Montana, is the home of descendants of two distinct tribes - Gros Ventre or Atsina and the Assiniboine. Both were plains tribes, but the Gros Ventre were of Algonquin stock, closely related to the Arapahoe, whereas the Assiniboine once were part of the Yanktonai Sioux.

The Gros Ventre were living in present day Montana when the first white men entered the region. The Assiniboine left their mother tribe (the Yanktonai Sioux) shortly before 1640. They migrated northward, following the Cree, and are believed to have settled first in the vicinity of the Lake of the Woods, then drifted northwest to the region around Lake Winnepage. They ranged into Canada and along the Milk River. Until 1838, they were a large tribe from 1,000 to 1,200 lodges. An epidemic of small pox reduced them to less than 400 lodges, and conflicts with neighboring hostile tribes diminished their numbers still further.

In 1888 three separate reservations, Blackfeet, Fort Belknap and Fort Peck were established. (Another group of Assiniboines are enrolled as members of the Fort Peck Tribes.) This was the final reduction in the area called Blackfeet Hunting Territory, which had been set aside by the Treaty of 1855, and was to be shared by the Gros Ventre, Blackfeet and Assiniboine Tribes in common for a period of 99 years.

The present enrolled membership is about 3,700 of which less than fifty per cent live on the Fort Belknap reservation.

Land owned by the tribe is leased to either Indian or non-Indian cattlemen, and with other assets produces an average annual income to the tribal government of approximately \$38,000. This money is used to defray, in part, the expenses of the Fort Belknap tribal government.

Fort Belknap's Indian criminal justice system consists of a full-time Chief of Police, four full-time patrolmen, one part-time patrolman, a communications dispatcher, a clerk, a full-time chief judge and two part-time associate judges.

The Fort Belknap Police Department was able to increase its service to the Indian community due to having received a discretionary grant from L.E.A.A. in the amount of \$33,377.00. Specifically, this grant provided two police patrolmen, one radio dispatcher and the necessary equipment for them to carry out their respective responsibilities for a period of one year.

There are six trainees working in conjunction with the criminal justice system on a program called "New Careers". It is hoped that these positions as community service officers will fill a need on the reservation at the end of their training period. Basically they are being trained in the supportive non-enforcement areas of the judicial, prevention and enforcement service of the tribal criminal justice system.

Hopefully, these positions will be permanent and either supported by the respective tribal governments or picked up on a joint contract with the Indians and B.I.A. "New Careers" is a discretionary grant program being jointly funded by L.E.A.A. and the Department of Labor. Projected plans indicate that the B.I.A. will pay one half of the second year salaries and all the third year salaries of the persons being trained to serve as community service officers. The New Careers project is sponsored by Montana's Inter-Tribal Policy Board and has trainees on each of the seven Indian reservations in Montana and the Windriver Reservation in Wyoming (Windriver is under the jurisdiction of the Billings Area B.I.A. office).

Plans are being formulated, and an application is being written to request funding from L.E.A.A. to provide an adult corrections facility for the Fort Belknap Indian Reservation. At the present time there is no facility for either adult or juvenile offenders on this reservation. It is becoming more and more of a problem due partly to the fact that it becomes necessary to secure contractual space outside the immediate jurisdiction of the Indian reservation in which to hold those offenders who are a threat to themselves and/or the general public on the reservation. It becomes a matter in which the alleged offender is simply being held by civil authorities with no access to a rehabilitative process.

Except in cases of violation of the Federal Major Crimes Statute, these offenders are misdemeanants and subject to a maximum of six (6) months confinement and a maximum of \$500 fine or both.<sup>6</sup> Each Indian reservation in Montana has its own tribal code. All of these codes are similar, having been adopted from Title 25 Code of Federal Regulations. Each also has its own tribal customs which have some bearing upon the judgement and justice handed out by tribal judge.

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6. Title II, Section 202-7, 1968 Civil Rights Act

## VI. THE FORT PECK INDIAN RESERVATION

The Fort Peck Indian Reservation covers in excess of two million acres of rolling farm and range land in northeastern Montana. This area varies in elevation from 1,900 to 3,100 feet above sea level and is subject to great extremes in temperature. It is not uncommon for the citizens of this region to experience summer temperatures in the 90 to 100 range and winters of severe cold ranging down to -35 to -50 farenheit. Precipitation is generally low in this area, but extremely variable. There is some timber of little commercial value located in the Missouri River bottom lands and lower reaches of its tributary streams.

The Indian population is concentrated in the southern part of the reservation along the Missouri River east of the Fort Peck Dam. The principal communities lie along the only east-west, through routes of transportation -- U.S. Highway No. 2 and the Burlington Northern Railroad, which closely parallel each other on the reservation as they do on the rest of the "High Line". Wolf Point is the largest town on the Fort Peck reservation. About twenty per cent of its 3,100 residents are Indian. Poplar, 22 miles to the east, is headquarters for the tribal government and the Indian Agency. Its 1,400 inhabitants are predominantly Indian.

The 6,466 persons who are enrolled on the Fort Peck reservation are of two distinct tribal groups, the Sioux and Assiniboine. To a large extent they still maintain their separate cultures. Only in recent years has there been any appreciable inter-marriage between them.

Both have inter-married with whites, with whom they have lived in close contact for many years and with whom they have attended public schools since 1935. Only 15 - 18 percent of the Fort Peck enrollees are full-bloods. Over 40% of the enrollees live off the reservation, primarily in the western states. Resident Indian population includes a considerable number of families of Cree and Turtle Mountain Chippewa who have no legal interest in Fort Peck assets.

The Fort Peck Indians have what they call a Tribal Executive Board and General Council as their governing body. They did not accept the Indian Reorganization Act, but their constitution was approved by the B.I.A. on October 1, 1960. The executive board is comprised of twelve voting members (two from each of six districts), a chairman, vice-chairman, and sergeant-at-arms, who are elected by the people.

By treaty of 1851, the Assiniboine Indians who were living in the vicinity of the present Fort Peck reservation were granted hunting and fishing privileges in common with the Blackfeet, Gros Ventres and other tribes, but were to receive rations at a station by the Big Bend of the Milk River near the present town of Harlem, Montana. By 1871 it was reported that large bands of Sioux Indians representing scattered remnants of several Sioux tribes, had attached themselves to this agency. A year later, upon recommendations of a commission appointed to study the problems of these Indians, the agency was moved to its present location at Poplar, Montana, and both Sioux and Assiniboine were concentrated there.

Establishment of the Fort Peck reservation was ratified and its boundaries established by Congress in 1888.

During the years 1908 - 1928, a series of bills were passed by Congress allotting lands to individual Indians. After 1911, lands not selected by the Indians were opened to homestead entry. For homestead lands the Fort Peck tribes were to receive \$1.25 per acre. Much of the better crop land of the area passed from Indian ownership prior to 1930. During the drought years of the 1930's many of the non-Indian farmers failed and sub-marginal farm lands were repurchased by the government. 85,506 acres of this sub-marginal land are leased by the tribes under revocable permit with the government, then released by the tribes to individuals. Today slightly over 50% of the land originally allotted to individual Indians is in non-Indian ownership. In all, Indians have about 871,018 acres of Indian land available for their own use. However, they actually use only about 34 percent of it themselves, leasing the rest to non-Indian farmers and ranchers and to oil companies. Less than 200 of the 865 resident families use the land themselves.

Income on the Fort Peck reservation is low, living conditions generally are poor and unemployment is a chronic problem. Though there is a wide range in income received by the resident Indian, the average and median income is far below that for the State of Montana.

The tribal executive board, in cooperation with federal, state and local organizations, is working to improve conditions on the reservation. Tribal land holdings are being increased and consolidated

through a continuing program of land purchasing. An irrigation project built by the BIA has increased production on nearly 40,000 acres of their land. New housing for over one hundred families has been built by the Fort Peck Housing Authority through the Housing Assistance Administration's low-rent housing program. The Public Health Service's sanitation program is bringing improved water supply and sanitation facilities to all Indian communities on the reservation.

A roster of personnel performing the duties in the judicial prevention and enforcement services includes a chief of police, Lt. of police, four patrolmen, three trainee patrolmen, and one trainee policewoman under the Emergency Employment Act, a chief judge, a juvenile judge, an associate judge at the tribal level, and one special officer designated as a juvenile officer, a resources manager and three detention guards who work for the B.I.A. The special officer has a clerk-stenographer and the associate judge also acts as clerk of the court.

The Fort Peck tribe's criminal justice plan is the only comprehensive effort that has been presented to the Board of Crime Control. In FY-70, this reservation received a discretionary grant of \$17,993 for a community relations program for tribal law enforcement. This program was evaluated as being quite successful, and, as a result, was continued in FY-71. During the second year funding period, one Indian police officer was the recipient of an Associate Arts Degree in Police Science. Essentially this was a police science course offered to the tribal officers on an extension basis by Dawson College. It was also open to the public and as a direct result created a much better understanding between the tribal law enforcement people and the general public, which in turn

has provided a much more concerned and active community. In FY-72, another discretionary grant was approved for the Fort Peck tribes. This program was in the amount of \$36,848 and provided basic fundamental equipment for the tribal police and also provided one male and one female juvenile officer for the juvenile delinquency department. At this time, the tribal planners are working on a proposal to provide a juvenile correctional facility for their criminal justice system.

In addition to the existing judicial, prevention and enforcement services personnel, Fort Peck is also participating in the New Careers program which was explained in the preceding chapter.

## VII. THE NORTHERN CHEYENNE INDIAN RESERVATION

The Northern Cheyenne Indians call themselves "The Morning Star People". They take that name from one of their famed leaders from the last century, Chief Morning Star, who is also known as "Dull Knife". A morning star design is the tribes brand and trade mark.

Because of the isolated location of their reservation in south central Montana, the Northern Cheyenne's have had less daily contact with non-Indians than any other tribe in Montana or Wyoming. Their isolation is reflected in their cultural patterns, customs and values. Recent improvements in transportation facilities, especially the designation and servicing of major highway US 212 which traverses the center of the reservation from east to west, is reducing the effect of isolation.

In recent years, growing programs in credit, economic development, public works, education, vocational training, employment, community development, and the upgrading of social services have accelerated the economic and social adjustments of the Northern Cheyennes. Of the 3,202 enrolled members of the tribe, some 700 make their homes away from the reservation.

The number of non-Indians living among the approximately 2,500 Indian residents of the reservation totals approximately 250. These include merchants, spouses of Indians, missionaries, teachers, and agency employees. Of the 433,434 acres of land within the reservation boundary,

there was in June 30, 1967, only 2.5% of the land in non-trust fee patent status. Much of this small acreage of non-trust land has been deeded to members of the tribe.

The Cheyenne Indians, of whom the Northern Cheyenne were part, originally dwelt near the Red River. They were reported by the French as early as 1680. By 1804 when Lewis & Clark met them, they were living on the plains near the Black Hills. They changed rapidly at about this time from agricultural people to a typical plains tribe.

The Cheyenne were bitter enemies of most Indian tribes except the Arapaho, their neighbors on the southeast, with whom they frequently intermarried. From the first, they were timid, suspicious, and then hostile in their relations with the whites. They participated in the treaty of 1825 near present Fort Pierre, South Dakota. A few Years later, a large part of the tribe decided to move southward and make permanent headquarters on the Arkansas River. The remainder continued to rove the plains near the headwaters of the North Platte and Yellowstone Rivers. This separation of the Cheyenne tribe was recognized by the Fort Laramie treaty in 1851.

The Northern Cheyenne joined the Sioux in the Sitting Bull War of 1876. Finally subdued, they were taken as prisoners of war to Fort Reno in Oklahoma, to be colonized with the Southern Cheyenne. They went unwillingly and refused to remain. A desperate effort to escape resulted in most of the group being killed. Little Wolfe, Morning Star and some sixty (60) followers managed to escape to the north. Finally subdued, they

were placed on their present reservation in 1884. The original reserve set aside by executive order of President Arthur consisted of 271,000 acres between the Crow Reservation and an imaginary line ten miles west of Tongue River. In 1900, President McKinley moved the boundary line eastward to the Tongue River. This boundary has since remained unchanged.

The small agricultural tracks along the rivers and streams had been settled by whites prior to establishment of the reservation. Land interests were purchased from about 40 white settlers. This reservation was one of the last to be allotted (1926). Since unallotted lands were not opened for homestead entry, but were reserved as tribal lands, the reservation is not as "checkerboarded" with non-Indian land as most reservations in this area.

About 20% of the Indian families make their home in rural areas along the streams and rivers. The remainder are concentrated principally in four communities, Lame Deer, Busby, Ashland and Birney. The housing and sanitation conditions in these communities have been improved considerably in recent years. The Northern Cheyenne are becoming more and more conscious of the need for better homes. Some type of home improvement has benefited 298 families on the reservation since 1965. These improvements include general repair, modernization and additions. As of January 1, 1968, 178 new homes had been constructed with more being planned for the future.

The Division of Indian Health, U.S. Public Health Service, which has been responsible for Indian health since 1955, is presently working with the Indian people to bring water sanitation facilities to each community. To date, water facilities and toilet and garbage facilities have been completed in the Lame Deer, Birney, and Busby communities, and in the rural area known as the Kirby District.

Today, many Northern Cheyennes find regular employment with the Bureau of Indian Affairs, the Public Health Service, the Saint Labre mission, Guild Arts and Crafts, the public schools, local businesses and in programs sponsored under the provisions of the Economic Opportunity Act.

Temporary employment includes jobs provided by the tribal council, farming and ranch work, firefighting, and programs such as the Neighborhood Youth Corps. Forty-five per cent unemployment still persists, however. While this compares unfavorably with the national average rate of unemployment, it is much more favorable than the percentage rates reported on many other reservations. The tribal council, with the assistance of the Bureau of Indian Affairs, hopes to attract reliable and responsible industries to the reservation to boost employment. Largely responsible for the improved employment picture is a plastic factory operated by Guild Arts and Crafts, Inc. of New York City. In September of 1962, this company set up a plastic assembly plant near the Ashland community. In March of 1963, an on-the-job training program was established to provide workers with a specialized skill in

jewelry making. In 1965, the company moved into a new tribally-owned factory near Ashland. The company is occupying the building under a 20 year lease with a renewal option. The factory employs an average of 130 or more year round and the annual payroll exceeds \$400,000.

The Northern Cheyenne tribe was organized in 1936 under the Indian Reorganization Act. Its principal source of income has been rent from tribally-owned land which totaled 265,225 acres on June 30, 1970. The tribe's aim has been to retain the Indian and tribal ownership of the reservation land base and encourage full use of the land by Indian operators and the tribe.

The tribe is operating a land purchase enterprise to prevent Indian lands from going into non-Indian ownership. The trend in land use shifted from 49% Indian use of range land in 1960 to 98% Indian use of range land in 1970.

Full use of the range land was accelerated by the establishment of a tribally owned steer herd in 1963. The time is near when all range land will be used by individual Indian cattlemen.

The Northern Cheyennes in 1964, received approximately \$3,900,000 in settlement of land claims against the United States Government. Much of the judgement fund money was spent for family improvement and most of the new houses built in recent years were paid for, at least partially, with judgement fund monies. The tribe has established a permanent \$250,000 scholarship fund and interest earnings are being used to finance the education of tribal members. The tribe also has in reserve, a substantial sum to use for economic and industrial development.

Approximately 75% of the Northern Cheyenne children attend public and private schools. The remaining 25% attend two schools operated by the Bureau of Indian Affairs.

Some of the natural resources of the reservation have not been fully developed. These include 71,000 acres of commercial timberland capable of producing approximately 4,000,000 board feet of timber annually on a sustained yield basis. Two small sawmills now operate on the reservation.

One highly important natural resource is an extensive deposit of sub-bituminous coal. A major coal company obtained a prospecting permit on about 95,000 acres of Northern Cheyenne land in 1966. Exploration is in progress and prospects seem highly favorable for development of a mining venture that might result in 100 or more jobs as well as substantial increases in tribal income.

Recent developments in the Colstrip area just north of the Northern Cheyenne reservation have indicated that there is a high degree of probability that this area will become economically important to the Northern Cheyennes in the very near future.

The greatest underdeveloped resource on the reservation is that of manpower. Full utilization of this human resource will require continued education, training and development of motivation to achieve self-sufficiency. Planned development of natural resources and development of new employment opportunities also carry high priority. Progress is being made in all areas.

Judicial, prevention and enforcement services on the Northern Cheyenne reservation are two fold in operation as they are on all of the Montana reservations. There is one agency special officer who works for the Bureau of Indian Affairs, a captain of police, two lieutenants, five patrolmen and one rural police officer. The officer assigned to the rural area of the reservation is funded by the Law Enforcement Assistance Administration on a discretionary grant in the amount of \$28,124, which also provided much needed equipment for the Northern Cheyenne police department to carry out their responsibilities. Through the acquisition of this specially trained police officer, the Northern Cheyenne tribe has been able to substantially improve the quality of law enforcement services available to its outlying residents. This also leaves the main force free to patrol the residential areas.

The tribal judicial system consists of a chief judge, a juvenile judge, and the clerk of courts.

The Northern Cheyenne reservation is also utilizing the "New Careers" personnel within their criminal justice system in the role of radio telephone dispatchers, file clerks, counselors, and in supporting roles in the adult and juvenile probation and parole areas after adjudication.

It is interesting to note that law and order personnel are aware of the power of public relations. A project was funded in the amount of \$8,472 this past fiscal year which was initially intended to provide classroom education and training for a period of eight (8) weeks for 20 male juveniles at the Northern Cheyenne reservation. The subject matter

was to acquaint the juvenile with the criminal justice system and provide a better relationship between the juveniles and parents and the people charged with the responsibility of the judicial, prevention and enforcement services. It was found by the tribal decision makers that the project was really serving a useful purpose, and, as a result of this evaluation, it was decided to increase the tribal support by an additional \$2,500 and add ten more youths to the program. It has been decided by the tribal council to continue this program as an annual summer youth activity. The Chief judge in the juvenile court has assumed the responsibility of coordinating future projects.

In addition to grants that the Northern Cheyenne tribe have received, they are putting together an overall plan for the improvement of their criminal justice system to encompass the next five years. When it is received by the Board of Crime Control, it will be made part of the comprehensive plan to improve the whole criminal justice system in Montana.

### VIII. THE CROW INDIAN RESERVATION

The Crow Indian Reservation, an area of over 1,500,000 acres is in south central Montana, mostly in Big Horn County. It is the home of approximately 4,035 members of the Crow Indian Tribe. About 1,290 members live away from the reservation though some of these live nearby and spend considerable time each year on the reservation.

The Crows are of Siouan origin, but had broken away from their ancestral group (Hidatsa), and settled along the valleys of the Yellowstone and Big Horn rivers in northern Wyoming and eastern Montana long before the coming of the white man.

Early history tells us that most of the northwest plains Indians originally came from northeastern North America. They were forced out of their forest and woodland habitat by more numerous and powerful tribes, perhaps the Mohawk and Iroquois. The ancestors of the Crow Indians came from a "Land of Many Lakes", probably in the headwaters of the Mississippi or further north in the Winnebago Lake region. They eventually settled along the Missouri River in what is now the states of North and South Dakota. These people lived in semi-permanent villages of lodges covered with earth. They became known as the "people who lived in earthen lodges".

Nearly 400 years ago these people divided into two factions. One group, the Hidatsa remained along the Missouri. The other group, the Absarokee migrated westward and eventually claimed most of what is now eastern Montana and northern Wyoming as homeland. At the time of the breakup, this group numbered about 500 and was made up of several families. It's population reached about 8,000 before the smallpox epidemic of the middle 1800's.

At that time, the Absarokee or Crow Tribe traveled in two or three groups or bands.

In the Hidatsa language, this group was called Absarokee, which literally means "children of the large beaked bird" (Absa meaning "large beaked bird" and Rokee meaning "children or offspring"). Other Indian tribes called these people the "sharp people" meaning that they were as crafty and alert as the bird Absa (probably the Raven) for which they were named. In referring to them in the hand sign language they would simulate the flapping of birds wings in flight. The early white man interpreted this sign to mean the bird "crow" and thus called the tribe the Crows or the Crow Indians.

In 1825, the Crow Tribe and the United States signed a treaty of friendship. In 1851 the so-called "Fort Laramie Treaty" established the boundaries of Indian Country for several tribes, including an area of 38,531,147 acres designated for the Crow Indians. This was followed by another Fort Laramie Treaty in 1868 which reduced the Crow Country 8,000,409.2 acres.

An act of Congress in 1882 resulted in further reduction of the land and as compensation the government was to build houses for the Crows and to buy livestock for them. By this time, the tribe had been settled within the boundaries of the reservation for about 10 years. In 1890, more land was ceded to the government for which they received \$946,000.00. In 1905, the last large land session was made leaving about three million acres for the tribe.

The Crow Indians always felt the government failed to give adequate compensation for the land they acquired. The estimated value received was less than five cents per acre. In 1904, the Crow Tribe first initiated legal proceedings for just compensation for lands taken.

In 1962, the Court of Indian Claims finally awarded \$10,242,984.70 to the Crow Indians.

Many attempts were made to reduce the Crow reservation. Senator Dickson in 1910, Senator Meyers in 1915 and Senator Walsh in 1919 sponsored legislation in Congress to open the balance of the Crow reservation for settlement by the public. All attempts failed. An Act of Congress passed on June 4, 1920, sponsored by the tribe itself, divided the remainder of the reservation into tracks which were allotted to every enrolled member of the tribe. The rough mountain areas were withheld from such allotment and remained in tribal ownership. The titles of these lands are held in trust by the federal government, and allottees may not dispose of their land without the consent and approval of the government.

The family was the primary unit of social organization. What may be regarded as the secondary unit was the clan. A clan is composed of distinctly related families with membership determined through the mother. A person belongs to his or her mother's clan, and not the father's clan. As the tribe increased in population, it was divided into sub-tribes or bands for convenience of government and travel.

The tribe and bands were governed by a body of chieftains. They managed the affairs of the tribe in matters of hunting, warfare with other tribes, the enactment of important ceremonials, maintenance of law and order, etc. The tribe consisted of two main bands. The River Crows who lived along the Missouri, Milk and Yellowstone Rivers and the Mountain Crows who enjoyed life along the high mountains of northern Wyoming and southern Montana. A third group known as the "Kicked in the Bellies" were closely related to the Mountain Crows. Both large groups had the same clans, there being about 12, such as, Whistling Waters, Newly Made Lodge Owners, Greasy Mouths, Filth Eaters, and Large Lodges.

Today the family is still the primary unit of modern Crow society, while the clan system is becoming more and more obsolete. The wife's position in the family has become more important than the husbands in recent generations. In the old days, the husband's position was very strong, and he enjoyed a strong "double standard" to the point where he could have several wives if he wanted to do so.

The affairs of the tribe are now largely administered by the Bureau of Indian Affairs of the federal government. The tribe has a council which meets on a town hall meeting basis. Administrative functions and major undertakings must be approved by the Bureau of Indian Affairs.

As citizens of the country, the Crow, like all Indian tribes, are subject to both state and federal laws with the same rights and responsibilities as other citizens. The tribe also maintains its own law and order system within the reservation designed to deal with problems and situations peculiar to Indian customs and ways which are not covered by state or federal laws. Enforcement of reservation laws rests with a modern police and courts system.

The Crow tribe adopted a written constitution on June 24, 1948. Under this constitution, the tribe has a general council form of government in which every adult enrolled member has a vote. One hundred or more tribal members constitute a quorum. A quorum must be present before a vote can be taken on any important matter of business. There is no representative tribal council. Under the constitution, the general council elects a chairman, a vice chairman, a secretary and a vice secretary. In addition, the general council elects various committees to act on matters such as law and order, enrollment, education, credit, etc. The Crow tribe was not organized under the Indian Reorganization Act, better known as the Wheeler-Howard Act.

The Crow agency supports a modern Indian police department consisting of a chief of police, whose position is provided by the Bureau of Indian Affairs, a tribal assistant chief of police, a lieutenant of police, a sergeant of police, six patrolmen, four radio-telephone dispatchers, a jailer and a cook. The Crow tribe also maintains a modern judicial system with a chief judge, associate judge, probation and parole officer and a clerk of court. In support of the tribal criminal justice system, the BIA provides an agency special officer, a juvenile officer and a clerk stenographer. The Crow tribal court is closely patterned after the organizational plan described in Title 25 of the Code of Federal Regulations, as "Courts of Indian Offenses". Courts of Indian Offenses were established by the Interior Department pursuant to a 1915 federal statute, "to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided". The federal regulations go on to provide that where a tribal council establishes their own tribal court and/or court ordinances, their actions will be controlling and will supersede the applicable federal regulations.

Tribal court judges are chosen and appointed by the tribal council with the requirement that they be resident tribal members without a criminal record. Generally, the judges are highly respected members of the tribal community, but have little or no legal background. On the whole, they possess a deep understanding of their own people and an appreciation of their distinctive needs.

## IX. INDIAN POLICE OFFICERS STANDARDS AND TRAINING

None of the Indian reservations in the state of Montana has a criteria set for police officers standards and training. It follows that until such time as a criteria is set, there is naturally going to be a below par status as far as the Indian criminal justice system is concerned.

The establishment of one standard of conduct for the Indian court system, from the standpoint of providing equal protection to all Indians that come before it charged with an offense, seems to be a logical area to begin upgrading the whole concept of criminal justice on our Indian reservations. Experiments have been conducted (with little success) on Indian reservations where an extension type of law enforcement training was presented to the tribal police by college-oriented personnel on a level that was difficult, if not impossible, for the Indians to comprehend. The basic reasons for the failures were a lack of qualified supervisory personnel, and no criteria for police officers standards and training. Along with this, of course, is the same basic lack of standards and training required for those persons charged with the responsibility of dispensing justice through the Indian court system. Once it is established that the Indian court system is, in fact, going to guarantee that the individual Indian is protected by the federal and state constitutions as required by the 1968 Indian Bill of Rights, then police officers standards and training will be established in order to insure this compliance at all levels within the judicial prevention and enforcement services.

It has gotten to the point, in our so called progressive society, that the tribal member is no longer satisfied with being granted only those rights which custom, tradition, usage, or tribal ordinances allow him. Since the 1968 Indian Bill of Rights was passed, tribal members realize that they are not only members of an Indian tribe, but also are aware that they have rights as citizens of the State and the United States.

As a direct result of this knowledge it is becoming more and more evident that the tribes and the individual units of local government that represent them can no longer allow tribal court procedure to deviate from required standards. More constitutional restrictions will be imposed, or more jurisdiction will be removed from the tribal courts, if it is found that they refuse to comply with this essential part of their legal process.

## X. INDIAN CRIMINAL JUSTICE SYSTEM RELATED SYSTEMS

Each Indian reservation, in addition to its tribal justice system has access to the Judicial, Prevention and Enforcement Services of the Bureau of Indian Affairs.

Their operating jurisdiction is restricted to the Indian reservation to which they are assigned and to the limitations, powers and authority prescribed in tribal codes or departmental regulations. In the enforcement of federal law relating to maintaining law and order on the reservation, officers whose appointments are made by the B.I.A. are given police authority sufficient to investigate federal crimes and offenses, to apprehend offenders, and to prevent such acts as those constituting offenses that occur on Indian reservations or other lands under federal criminal jurisdiction. These officers may work within the structure of the tribal police departments on a joint contract with the Indians and the B.I.A. and act as supplemental officers for that agency, or they may work directly for the B.I.A. as special officers assigned to a specific Indian reservation.

The investigation of any of the Major Crimes Act offenses automatically calls into service the B.I.A. special officer and in most cases the resident agent of the FBI. These officers cooperate with the tribal police, being assisted by them in all phases of the investigative procedure. The agents of the FBI, of course, are not as restricted as are the B.I.A. special officers as relates to geographic jurisdiction.

The Montana Highway Patrol operates within the exterior boundaries of the Indian reservations, but in a very restricted manner. Some of the Indian governments have adopted the Montana vehicle code while others have not, making the enforcement effort very frustrating to say the least. Montana Highway Patrol arrests on the Indian reservations are contingent upon the arrestee not being an Indian under the jurisdiction of the tribal government on the Indian reservation where the offense was committed. Arrest practices of the M.H.P. on Indian reservations are by necessity preferential and selective in nature.

Montana Sheriff's and their deputies have no jurisdiction on any Indian reservation in Montana, with the exception of the Flathead reservation. The Confederated Salish-Kootenai Tribes of the Flathead voted to allow concurrent jurisdiction with the State of Montana in February of 1963 in accordance with Public Law 280.

## XI. THE INDIAN BILL OF RIGHTS

The Indian Bill of Rights came into being with the passage of Title II of the 1968 Civil Rights Act.

There is no provision in the United States Constitution that specifically gives Congress the power to control Indians, however, a long line of judicial decisions has recognized that the principal source of congressional power over Indians originates from the field of international law and the law of conquest.

The courts have consistently applied the notion that the Indian tribes possess a sovereignty equal to that of all foreign nations. Their sovereignty is, however, limited to internal powers (e.g., they cannot make treaties with other powers); and by treaty or legislation, Congress may at any time modify the sovereignty of the tribes.

Before the passage of Title II, an Indian had no federally protected rights, his only protection was the tribal law and order code, and the Indian judge's sense of fair play. Title II is intended to have about the same influence on the tribes as the 14th Amendment has upon the states.

Sub-chapter I of Title II of the Indian Bill of Rights, as analyzed by John S. Warren in volume 33 of the Montana Law Review, highlights some familiar constitutional guarantees:

Section 202-1 provides that no Indian tribe shall "make or enforce any law prohibiting the free exercise of religion or abridging the freedom of speech, or the press, or the right of people peacefully to assemble and to petition for redress of grievances".

This is identical to the first amendment, except that no mention is made of legislation respecting an establishment of religion--a concession to theism in some tribal governments.

Section 202-2 pertaining to searches and seizures, is identical to the Fourth Amendment in all but minor grammatical aspects.

Section 202-3 and 5 refer to double jeopardy, self-incrimination and taking of private property for public use without just compensation. A noted absence is the Fifth Amendment right for presentment or indictment by a grand jury before a person may be held to answer for a capital or otherwise infamous crime.

Section 202-6 quotes substantially the Sixth Amendment. It makes, however, an important deviation. Instead of the guarantee of "assistance of counsel for his defense", the Indian defendant before a tribal court has a right to counsel but only "at his expense".

Section 202-7 qualifies the power of an Indian tribe in that it may not "require excessive bail, impose excessive fines, inflict cruel and unusual punishment". These phrases are identical in substance to the Eighth Amendment. The section places a further limitation on the power of Indian tribal courts. They may not impose for one offense a penalty of imprisonment for more than six months or a fine of more than \$500, or both.

Section 202-8 states that no Indian tribe shall "deny any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law". These are the familiar Fourteenth Amendment guarantees.

Section 202-9 commands a tribal council not to "pass any bill of attainder or ex post facto law". This restraint on Indian legislative bodies is identical to the constitutional mandate for Congress in Article I, Sec. 9, clause iii.

Section 202-10 guarantees the right to trial by a jury of not less than six persons for anyone accused of an offense punishable by imprisonment, as does the Sixth Amendment.

As a further protection, Section 203 provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe".

Inasmuch as Title II limits the power of the tribal courts and councils, it is similar to the Major Crimes Act. The constitutionality of the Major Crimes Act has never been questioned.

Unlike the Major Crimes Act, which is concerned only with federal jurisdiction over certain specified crimes, Title II is legislation which provides civil rights to Indians. It can be evaluated by four methodological categories:

(1) those sections where the rights extended to Indians are identical with the rights an American enjoys under the Constitution (e.g., speech, press, assemblage; right against unreasonable searches and seizures; double jeopardy, self-incrimination, public taking without just compensation; speedy and public trial; no excessive bail, fine, nor infliction of cruel and unusual punishment; equal protection and due process, no bills of attainder or ex post facto laws; and review by habeas corpus proceedings);

(2) those sections from which other constitutional guarantees have been omitted (e.g., from 202-1 is omitted "no law shall be made respecting the establishment of religion; and from 202-3-5 the right to an indictment by a grand jury for a capital or infamous crime; generally omitted is the right to keep and bear arms);

(3) those sections where Congress imposed restraints more extensive than those of the U.S. Constitution (e.g., 202-7 limits tribal judicial action to the imposition of penalties no greater than six months in jail, a fine of \$500, or both);

(4) those sections which extend less than the constitutionally protected rights enjoyed by other American citizens (e.g., section 202-6 the right to counsel at one's own expense; and section 202-10 grants the right to a jury trial for those accused of crimes punishable by imprisonment as opposed to the "in all criminal prosecutions" of the Sixth Amendment).

In light of the doctrine of tribal sovereignty, these categories require separate evaluations of their constitutionality.

It is of little value to question the extension to Indians of rights identical with those of the Constitution. Because Congress has the power, and because the manner of its exercise is identical to the Constitution, no possibility of invalidation for want of constitutionality arises.

Similarly, where Congress neglected to make any mention of restraints which are otherwise imposed on national and state governments, it cannot be said this omission is unconstitutional. Indeed, Indians and Indian tribes can only derive federally protected rights through federal legislation.

Inasmuch as the rights were not enjoyed in the past, and would not be today were it not for Title II, this portion of the legislation cannot fail for not extending to Indians rights commensurate with those of non-Indians.

Title II allows a tribal court to deny an accused assistance or counsel where the accused cannot provide a lawyer "at his own expense".

While the right to counsel in Title II is conceptually different from the right to counsel in the Constitution, practically speaking, the difference may not be so great. Because Congress limited the severity of punishments which a tribal court may impose, it can be argued it was contemplated tribal courts would handle only misdemeanors of the petty offense class.

Title 18 of the U.S. Code defines a petty offense as a misdemeanor, the maximum punishment for which does not exceed six months imprisonment nor a fine greater than \$500. A misdemeanor is any crime not a felony, and a felony is an offense punishable by death or imprisonment for more than one year. Following this line of reasoning, the Title II right to counsel is not unconstitutional. Presently, it cannot be said one is constitutionally entitled to the assistance of counsel when accused of a misdemeanor (pending further interpretation of recent U.S. Supreme Court opinions).

No matter what the outcome of the Title II right to counsel issue, there remains the interpretational problems of its due process clause. Until the Supreme Court grapples with this issue, an accurate assessment of the impact of Title II cannot be made. It is clear, however, that legislative

philosophy behind Title II disregards the doctrine of tribal sovereignty and self-government. For those who believe the best government for Indians is government by Indians, Title II may well prove more bane than boon.

The congressional intent in enacting Title II is adequately described in the committee reports. In passage of this act, Congress presumed the ills suffered and the inequities faced by American Indians could be, at least partially, cured by federal legislation and that those ills and inequities flowed from tribal action.

The history of congressional and executive control over the "Indian problem" suggests otherwise. From the advent of the white man and his interference with the Indian way of life, the social and cultural positions of the Indian and his tribe have deteriorated. During the past one hundred years this deterioration stemmed almost exclusively from the simple assumption by the white man that he was better qualified to govern Indians and Indian tribes than were the Indians themselves. In other words, the principle of self-government was not considered appropriate for Indians. Fortunately for the Indian and the white, the trend appears to have changed. The executive branch has officially abandoned the belief that Indians are incapable of governing themselves as evidenced by a message to Congress on Indian Affairs from President Richard M. Nixon, July 8, 1970.

The practical effect of Title II is to restrict tribal sovereignty just as did the Major Crimes Act, of March 3, 1885. In this respect it is in keeping with the philosophy of the last century. It is a blatant imposition of white values on a different culture. Even if it is assumed that Indian culture has

been changed through interaction with the white culture to one of only distantly related fragments lacking in cohesion, this imposition still violates the right of self-government derived from the concept of tribal sovereignty enunciated so long ago by Chief Justice Marshall. Assuming elements of Indian culture still exist in a form capable of supporting a self-governing entity, as many advocates of "red power" declare, Title II may in the long run do more harm than good. While the ills this legislation sought to cure do indeed exist, federal legislation is no panacea. The remedy must be discovered and applied by individual Indian tribes. Success will follow only if the tribes are allowed to develop more traditional forms of self-government.





